90-1618

Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN B. KINGSTON

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. When the Court of Appeals decides that they must ascertain a method to sentence the defendant for a violation of 21 U.S.C. § 841 (d) by applying United States Sentencing Guideline § 2D1.1, is it proper for the Court of Appeals to apply United States Sentencing Guideline §2D1.4?

II. Where the Presentence Report concludes that the Defendant is a minor participant and the defendant testifies that he is a minor participant, and the United States does not follow the proper court rules to contest this fact, should the Court of Appeal remand to allow the United States to contest the sentencing of the defendant as a minor participant?

III. Is a conviction for reckless driving a minor traffic infraction or was the Court od Appeals correct to hold that 18 U.S.C. § 3559 defining "infraction" should be applied to a state crime and then require driving convictions to be used to enhance punishment?

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REPORT OF OPINIONS

The Court of Appeals rendered its decision on December 20, 1990. The opinion is published as *United States v. Kingston*, 922 F.2d 1234 (6th Cir. 1990).

STATEMENT OF JURISDICTION

John B. Kingston, Petitioner in the herein cause ("Defendant"), seeks review of the Sixth Circuit Court of Appeals decision entered on December 20, 1990, which allowed Defendant to be sentenced under an inappropriate Sentencing Guideline.

The Court of Appeals also allowed the United States, on remand to the District Court, to contest Defendant's sentence as a minor participant, where the Presentence Report concluded Defendant was a minor participant and where Defendant testified that he was a minor participant.

Finally, the Court of Appeals applied the federal statute defining "infractions" to Defendant's state law reckless driving

conviction thereby increasing Defendant's sentence.

Defendant petitions this Honorable Court for review of his case pursuant to 28 U.S.C. § 1254.

STATEMENT OF CASE

On September 20, 1989, Defendant entered a plea of guilty to an Information charging him with one count of violating 21 U.S.C. § 841(d). The District Court accepted Defendant's plea of guilty and, on December 11, 1989, sentenced Defendant to a term of forty-one (41) months.

21 U.S.C. § 841(d) states that it is an offense for a person to knowingly or intentionally possess a listed chemical with the intent to manufacture a controlled substance, knowing or having reasonable cause to believe that the listed chemical will be used to manufacture a controlled substance. Defendant in this case possessed phenylacetic acid, a listed chemical under 21 U.S.C. § 802(33). The United States Sentencing Guidelines, *Guidelines Manual*,

Appendix A (Nov. 1989) ("Sentencing Guidelines") require that offenses under Section 841(d) are to be sentenced pursuant to Section 2D1.1 of the Sentencing Guidelines.

The District Court, in determining the amount of substance possessed by Defendant, as required by the Sentencing Guidelines in effect at the time of the offense, applied the method that is used to determine the amount of substance involved as if this were an attempt or conspiracy offense under 21 U.S.C. § 846 (Section 2D1.4 of the Sentencing Guidelines). TR. Dec. 11, 1989, at 53. Section 2D1.4 uses the amount of a controlled substance that would have been produced had the object of the attempt or conspiracy been completed. The presentence report used this method to find the level for sentencing. (Presentence Report at 5, paragraph 31).

Defendant asserted that the methods provided in Section 2D1.4 of the Sentencing

Guidelines are inapplicable to offenses under 21 U.S.C. § 841(d). Defendant argued that Section 841(d) is a separate crime from an attempt or conspiracy, and the amounts required to be determined for purposes of applying the guidelines should not be determined by using Section 2D1.4, but by applying 2D1.1. The presentence report mistakenly stated it used Section 2D1.1 when in fact it used Section 2D1.4. (TR Dec. 11, 1989, at 6; Objections of Defendant to presentence report at 4-6). The difference between Section 2D1.1 and 2D1.4 is that Section 2D1.1 punishes possession whereas Section 2D1.4 punishes the attempt to commit the offense. The District Court also found that phenylacetic acid is not within the definition of a controlled substance. (TR Dec. 11, 1989 at 6).

Defendant contended on appeal that, in order to give meaning to the definition of "controlled substance", 18 U.S.C. § 802(6) must be interpreted to include listed precursor

chemicals. (TR Dec. 11, 1989 at 6). Pursuant to 18 U.S.C. § 3742, Defendant appealed the sentence imposed by the District Court. The United States filed a cross appeal contending the District Court erred in finding that (1) Defendant was a minor participant and that (2) Defendant's conviction for reckless driving was not to be counted in determining Criminal History. Defendant asserted the District Court was correct in these rulings.

On appeal, the Sixth Circuit applied the Section 2D1.4 method for determining Defendant's base offense level instead of Section 2D1.1, even though the Court of Appeals was required to use Section 2D1.1.

Secondly, although the presentence report concluded that Defendant was a minor participant and Defendant testified that he was a minor participant, the Court of Appeals found that it was necessary to remand to the District Court to allow the United States to contest Defendant's minor participant finding by the District

Court even though the United States failed to properly contest this issue in the District Court.

Finally, the Court of Appeals further found that Defendant's state reckless driving conviction was an "infraction" under the federal statutes and improperly included the conviction in computing Defendant's criminal history points.

This Court has not addressed or decided the important issue of the correct method of sentencing under 21 U.S.C. § 841(d).

STATEMENT OF FACTS

In May of 1989, Defendant agreed with two other un-indicted individuals, David Rogers and Richard Wright, to buy phenylacetic acid for the production of methamphetamine. Rogers ordered an instructional manual on how to manufacture methamphetamine, discussed the process with Wright, and then both approached Defendant for the purpose of paying for the phenylacetic acid. (TR Sept. 20, 1989 at 19-20). Thereafter, an

order for phenylacetic acid was placed at a local chemical supply company. Defendant picked up the phenylacetic acid at the supply company and delivered it to Rogers' house. (TR Sept. 20, 1989 at 19-20).

Thereafter, upon learning that the United States Attorneys office was investigating the matter, Defendant initiated discussions and ultimately entered a guilty plea to an information charging a violation of 21 U.S.C. § 841(d).

I.

CERTIORARI SHOULD BE GRANTED IN THIS CASE OF FIRST IMPRESSION TO RESOLVE A DISCREPANCY IN THE SENTENCING GUIDELINES IN THAT OFFENSES UNDER 21 U.S.C. § 841 (d) SHOULD BE SENTENCED IN ACCORDANCE WITH UNITED STATES SENTENCING GUIDELINE § 2D1.1, NOT UNDER UNITED STATES SENTENCING GUIDELINE § 2D1.4.

The Information in this case charged Defendant as follows:

INFORMATION

COUNT 1

> The United States Attorney charges that on or about June 14, 1989, in the Eastern District of Tennessee, JOHN KINGSTON, knowingly and intentionally possessed phenylacetic acid, a listed chemical, knowing that the phenylacetic acid would

be used, without authority, to manufacture methamphetamine, a Schedule II controlled substance.

[21 U.S.C. § 841(d)]

Defendant pleaded guilty to a violation of 21 U.S.C.§ 841(d), which reads as follows:

Offenses involving listed chemicals

(d) Any person who knowingly or intentionally

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of record-keeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18, or imprisoned not more than 10 years, or both.

Listed chemicals are defined in 21 U.S.C. § 802 (33) and (34) as follows:

(33) The term "listed chemical" means any listed precursor chemical or listed essential chemical.

(34) The term "listed precursor chemical"

means a chemical specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this title and is critical to the creation of the controlled substances, and such term includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following:

(A) Anthranilic acid and its salts.
(B) Benzyl cyanide.
(C) Ephedrine, its salts, optical isomers, and salts of optical isomers.
(D) Ergonovine and its salts.
(E) Ergotamine and its salts.
(F) N-Acetylanthranilic acid and its salts.
(G) Norpsuedoephedrine, its salts, optical isomers, and salts of optical isomers.
(H) Phenylacetic acid and its salts.
(I) Phenylpropanolamine, its salts, optical isomers, and salts of optical isomers.
(J) Piperidine and its salts.
(K) Pseudoephedrine, its salts, optical isomers, and salts of optical isomers.
(L) 3,4-Methylenedioxyphenyl-2-propanone.

21 U.S.C. Section 802 (6), defines a "controlled substance" as:

> [A] drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.

The Schedules referred to in Section 802 (6)

are found at 21 U.S.C. § 812. However, none of the "precursor" chemicals listed in Section 802 (34) are found in Section 812. Therefore, in order to give meaning to the language "immediate precursor" in Section 802 (6), the definition of controlled substance must be read to include the precursors listed in Section 802 (34), and the schedule for the precursor chemical would be the controlled substance for which the listed chemical is the precursor.

The Court of Appeals noted that, under 21 U.S.C. § 802 (23), the Attorney General had not designated phenylacetic acid as an "immediate precursor." United States v. Defendant, Nos. 90-5192/5193, slip opinion, p.6 (6th Cir. December 20, 1990). Defendant, however, points out the similarity of the language in 21 U.S.C. §§ 802 (23) and (34). Section 802(23) defines "immediate precursor" as a substance:

> (A) which the Attorney General has found to be and by regulation designated as being the principle compound used, or produced primarily for use, in the manufacture of a controlled substance; (B) which is likely to be used in the manufacture of such controlled substance;

and (C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.

Similarly, Section 802 (34) defines "listed precursor chemical" as follows:

> The term "listed precursor chemical" means a chemical specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this title and is critical to the creation of the controlled substances, and such term includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following:
>
> * * *
>
> (H) Phenylacetic acid and its salts.
>
> * * *

Section 802 (23) and (34) are essentially trying to accomplish the effective control of certain chemicals and substances. Since the Attorney General has specifically designated phenylacetic for control, the listed precursors in Section 802 (34) must be included within the definition of controlled substance.

The Court of Appeals then reasoned that, since Section 841(d) is essentially an attempt

statute, the District Court correctly based its sentence on the amount of controlled substance that would have been involved had the attempt been successful. United States v. Kingston, slip opinion, p. 8. The Court of Appeals recognized the consistent application of this theeory of punishment to cases involving Section 846 cases and cited several recent cases interpreting sentences under Section 846. Id. Defendant, however, points out that the cases cited by the Court of Appeals specifically involved charges under 21 U.S.C. § 846, the attempt and conspiracies statute. Section 846 states:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The Sentencing Guidelines, Appendix A (Nov. 1989), specifically state that Section 846 offenses are to be sentenced in accordance with Section 2D1.4 of the guidelines. In language similar to Section 846, Section 2D1.4 states:

> Base Offense Level: If a Defendant is convicted of participating in an incomplete conspiracy or and attempt to commit any offence involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

In addition, the Commentary to Section 2D1.4 specifically references 21 U.S.C. § 846 as statutory authorization.

On the other hand, Appendix A refers violations of Section 841(d) to Section 2D1.1 of the Sentencing Guidelines. Section 2D1.1 bases punishment not on the amount of substance that would have been produced, but on the amount of substance possessed. Defendant has found no case under Section 841(d) interpreting the method to be used in determining the base offense level for Section 841(d) offenses. Defendant does not deny that the goals of the drug statutes are similar in that the statutes collectively prohibit the use, manufacture, distribution and sale of certain substances or the attempt thereof. 21 U.S.C. § 841,

however, is not an attempt statute. It is a possession statute and the penalty thereunder must be determined by the amount of the substance possessed, in this case two (2) kilograms of phenylacetic acid. Had the United States intended Defendant to receive a sentence based on the completed attempt or conspiracy theory, the United States should have charged Defendant under 21 U.S.C. § 846. The Court of Appeals addressed the discrepancy in the Sentencing Guidelines in omitting the "listed chemicals" under Section 802 (34) from the drug Tables stating:

> This discovery, however, does not solve our problem. We must still ascertain a method whereby violations of § 841(d) can be punished under U.S.S.G. § 2D1.1. We believe that the method advanced by the Government, basing the sentence on the amount of the controlled substance that would have been involved in the crime had the scheme advanced, is the fairest way to reconcile § 841(d) and U.S.S.G. § 2D1.1.

The Court of Appeals was clearly wrong in this conclusion, especially in light of the fact that the method advanced is specifically

inapplicable to Section 841(d) convictions. Id. Defendant was not charged with an attempt or conspiracy, which were intended to be punished by the completed product doctrine, and was therefore erroneously sentenced.

The Court of Appeals noted several cases where circuits have calculated the offense level by estimating the amount of methamphetamine that could have been produced based on the amount of precursor chemicals found at the laboratory site. *United States v. Manthei*, 913 F.2d 1130 (5th Cir. 1990); *United States v. Touby*, 909 F.2d 759 (3d Cir. 1990); *United States v. Wagner*, 884 F. 2d 1090 (8th Cir. 1989); *Kingston*, Slip opinion at 9. Defendant stresses that each case cited by the Court of Appeals involved defendants charged under Section 846, the attempts and conspiracies statute, and not under Section 841. Although the lower courts and the Presentence Report stated that Section 2D1.1. was applied, it is clear that Section 2D1.4 was in fact applied to determine

Defendant's base offense level. Section 2D1.4 is the wrong method to determine the offense level under Section 841(d).

Since Section 841(d) and the definition of precursor chemicals provided in Section 802 (34) were added after the enactment of the definition of a "controlled substance" in Section 802(6), it could not have been Congress, nor the Sentencing Commission's, intent to exclude listed precursor chemicals from the "controlled substance" definition, particularly where the Attorney General has specifically designated phenylacetic acid for control purposes. See, 21 U.S.C. Sec. 802 (34), Supp. 1989. Phenylacetic acid, therefore, must be included within the definition of "controlled substance" under Section 802 (6).

Defendant's starting point in determining the amount of controlled substance to be used in Section 2D1.1 of the Sentencing Guidelines is Appendix A. For convictions under Section 841(d), Appendix A refers to Section 2D1.1, not

Section 2D1.4, as the applicable sentencing guideline section. Section 2D1.1 lists various controlled substances; phenylacetic acid is not listed. However, Section 2D1.1, as of the relative dates to this case, does refer to *other* Schedule I or II controlled substances. The text at Level 12 of the Drug Quantity Table states:

> ...1.25-2.4 KG Schedule III or other Schedule I or II controlled substance...

Section 2D1.1, *Drug Quantity Table*.

It is not disputed that Defendant possessed two (2) kilograms of phenylacetic acid knowing or having cause to believe it would be used to manufacture a controlled substance. (TR Dec. 11, 1989 at 9). Phenylacetic acid, although not specifically listed in a Schedule by name, would come under Section 2D1.1 as an "other" Schedule II controlled substance as a precursor to methamphetamine, a Schedule II substance.

In order to give meaning to Section 841(d), and still maintain the integrity of the

attempt and conspiracy section of the Sentencing Guidelines, the definition of controlled substance in Section 802 (6) must be read to include the precursor chemical phenylacetic acid.

The Court of Appeals' analysis, as it changes the contemplated method of sentencing Sections 841(d) convictions, is not "the fairest way to reconcile § 841(d) and §2D1.1." Slip opinion at 7.

Furthermore, the United States referred to this case and Defendant (and others not charged in this case), as "co-conspirators" charged with an attempt crime. (TR Sept. 20, 1989 at 16-18). At the sentencing hearing, the United States stated:

> the question is what quantity of methamphetamine is at issue in this attempt to manufacture methamphetamine.

(TR Dec. 11, 1989 at 6) (emphasis added).

The United States further stated:

> the sentence that this man would get for the attempt to manufacture, which is really what this is, by any other name, the attempt to manufacture methamphetamine, and that sentence would

> be the one set out in the sentencing guidelines, and 2D1.4 by analogy certainly supports that conclusion.

(TR Dec. 11, 1989 at 37).

Notwithstanding the United States' assertions, Section 2D1.4 does not support the conclusion that offenses under Section 841(d) should be treated in the same manner as offenses under Section 846. It is clear that the Court of Appeals treated this case as if this were an attempt or conspiracy offense and accordingly sentenced Defendant. Defendant, however, is not charged with a violation of Section 846. Furthermore, the United States cites no authority to support the position that Section 2D1.4 is applicable to an offense charged under Section 841(d). The United States' position is in direct conflict with Appendix A.

Defendant contends that to trigger the application of Section 2D1.4, there must be an attempt or conspiracy conviction under 21 U.S.C. §§ 846 or 963. By its plain language, Section 2D1.4 should be used only "if a defendant is

convicted" of participating in an attempt or conspiracy.

Defendant asserts that where a known, identified amount of substance exists, the possession of which is the object of a criminal statute, there is no need to impose or estimate the amount of another substance that could have been produced. Since phenylacetic acid is a listed precursor chemical (to methamphetamine, a Schedule II controlled substance), phenylacetic acid should likewise be included as a Schedule II controlled substance pursuant to the definition of a controlled substance, which encompasses an "immediate precursor", under Section 802(6). The proper method for treating a Section 841(d) offense is to place the particular listed precursor chemical in the same Schedule as the substance for which it is a precursor and to use the section of the Sentencing Guidelines which the sentencing commission mandates, rather than the section the Court of Appeals says is the "fairest way to

reconcile § 841(d) and § 2D1.1."

II.

WHERE THE PRESENTENCE REPORT CONCLUDES THAT DEFENDANT IS A MINOR PARTICIPANT AND DEFENDANT TESTIFIES THAT HE IS MINOR PARTICIPANT, AND THE UNITED STATES DOES NOT FOLLOW THE PROPER COURT RULES TO CONTEST THIS FACT, THE COURT OF APPEALS CANNOT REMAND TO ALLOW THE GOVERNMENT TO CONTEST THE SENTENCING OF THE DEFENDANT AS A MINOR PARTICIPANT.

The Court of Appeals remanded to the District Court to hear proof on the issue of whether Defendant was a "minor participant." The Court of Appeals concluded that the District Court found that Defendant was a minor participant "without hearing any proof from either party in support of that contention" and relied solely on the presentence report. Slip opinion at 11. Defendant does not dispute the holding in *United States v. Rodriguez*, 896 F.2d 1031 (6th Cir. 1990), wherein the Sixth Circuit Court of Appeals held that a defendant must prove by a preponderance of the evidence that he is entitled to a reduction of the appropriate offense level. *Rodriguez*, however, is not

applicable to this case because Defendant did, in fact, testify in his own behalf regarding specific facts surrounding his participation in this matter. (TR Sept. 20, 1989 at 19-20). The District Court, based on Defendant's testimony and the conclusions of the investigations as stated in the Presentence Report, correctly held that Defendant was a minor participant. Furthermore, the United States did not follow Rule 27.3 of the Local Rules of Practice requiring objections to the Presentence Report to be supported by affidavits. The United States, in fact, made no objection to the Presentence Report. The United States, on remand, should not now be allowed to contest Defendant's minor participant finding by the District Court.

The District Court's determination that Defendant was a "minor participant" was a factual determination. (TR Dec. 11, 1989 at 54). As stated in 18 U.S.C. § 3742(e), in pertinent part:

The Court of Appeals shall give due

> regard to the opportunity of the District Court to judge the credibility of the witnesses, and shall accept the findings of fact of the District Court unless they are clearly erroneous and shall give due deference to the District Court's application of the guidelines to the facts.

The Court of Appeals did not give the District Court's findings due regard as required under Section 3742(e). Defendant offered testimony as to his participation in the events surrounding this case and the Court of Appeals is bound by the lower court's findings so long as they are not clearly erroneous. The Court of Appeals, therefore, erred in allowing the United States in to contest Defendant's status as a minor participant.

III.

> A CONVICTION FOR RECKLESS DRIVING IS A MINOR TRAFFIC INFRACTION AND THE COURT OF APPEALS SHOULD NOT HAVE APPLIED 18 U.S.C. §3559, THE FEDERAL STATUTE SETTING FORTH THE DEFINITION OF "INFRACTION," TO A STATE CRIME AND REQUIRE DRIVING CONVICTIONS TO BE USED TO ENHANCE PUNISHMENT.

The District Court correctly found that Defendant's reckless driving conviction should

be excluded from the criminal history category. The Court of Appeals, relying on *United States v. Aichele*, 912 F.2d 1170 (9th Cir. 1990), reversed the District Court on the basis that reckless driving convictions are not "minor traffic infractions" under U.S.S.G. § 4A1.2(c)(2). The Court of Appeals cites *Aichele* and 18 U.S.C. § 3559 for the proposition that an "infraction" is defined as an offense punishable by a maximum term of "[f]ive days or less, or . . . no imprisonment." Section 3559 states:

> Sentencing classification of offenses
> (a) Classification. - An offense that is not specifically classified by a letter grade in the section defining it, it is classified if the maximum term of imprisonment authorized is -
>
> (1) life imprisonment, or if the maximum penalty is death, as a Class A felony;
>
> (2) twenty-five years or more, as a Class B felony;
>
> (3) less than twenty-five years but ten or more years, as a Class C felony;
>
> (4) less than ten years but five or more years, as a Class D felony;
>
> (5) less than five years but more than one year, as a Class E felony;
>
> (6) one year or less but more than six

months, as a Class A misdemeanor;

(7) six months or less but more than thirty days, as a Class B misdemeanor;

(8) thirty days or less but more than five days, as a Class C misdemeanor; or

(9) five days or less, or if no imprisonment is authorized, as an infraction.

(b) Effect of classification. - An offense classification under subsection (a) carries all the incidents assigned to the applicable letter designation, except that the maximum term of imprisonment is the term authorized by the law describing the offense.

Section 3559 is applicable only to *federal* crimes and the requirement thereunder to classify federal crimes by letter grades. In order to determine the letter grade for a particular federal offense, it is sometimes necessary to convert the term of imprisonment to a corresponding letter grade. The conversion from a term of imprisonment to a letter grade is based on the *maximum* term of imprisonment as stated in the particular section violated. For example, the sentence for offenses under 21 U.S.C. § 841(a) is not expressed in terms of a

letter grade. The maximum sentence for a Section 841(a) offense is a life sentence. *See* 21 U.S.C. § 841(b). As required by 18 U.S.C. § 3559, it is necessary to convert the life sentence to a letter grade. A life sentence converts to a letter grade of a Class A felony. 18 U.S.C. § 3559(a)(1). The term "infraction", therefore, cannot be used to similarly classify state law violations. An infraction should be determined based on the actual penalty pronounced.

Further, even if the definition of "infraction" is applied to state law violations, the Sentencing Guidelines specifically state that criminal history category points are based on the sentence pronounced. U.S.S.G. § 4A1.2, *Application Note 2*. As the Court of Appeals correctly noted, Defendant's actual penalty was a $50 fine. Slip opinion at 11. Defendant contends that the application of the definition of "infraction" to state law violations, as applied by the Court of Appeals, is clearly

erroneous and contrary to the Sentencing Guidelines.

As stated in U.S.S.G. § 4A1.1, *Application Note 3*:

> 3. §4A1.1(c).
>
> * * *
>
> Sentences for certain specified non-felony offenses are never counted. See 4A1.2(c)(2).
>
> * * *

Section 4A1.2(c)(2) specifically states that:

> (2) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are never counted:
>
> Hitchhiking
> Juvenile status offenses and truancy
> Loitering
> Minor traffic infractions
> Public intoxications
> Vagrancy

In this case, Defendant's fine of $50 is indicative of the status of the crime as an infraction. A different result may result had Defendant actually been sentenced to a term of imprisonment. Defendant's conviction for reckless driving should not be counted in his

criminal history computation.

CONCLUSION

Defendant asserts that the Court of Appeals erred by applying Sentencing Guideline § 2D1.4 when the correct Sentencing Guideline to be used was Section 2D1.1. Defendant respectfully requests that this Court reverse the Court of Appeals decision and remand the case so that Defendant may be sentenced according to Section 2D1.1 of the guidelines, not Section 2D1.4 as if Defendant were charged with an attempt or conspiracy under 21 U.S.C. § 846.

The Court of Appeals also erred in allowing the United States to contest on remand Defendant's status as a minor participant when the Presentence Report specifically determined that Defendant was a minor participant and when Defendant testified that he was a minor participant. Defendant asks this Court to reverse the Court of Appeals on this issue.

Finally, the District Court erred in determining that the federal statute defining

infraction ia applicable to state law convictions and included in Defendant's criminal history category. Defendant respectfully requests this Court to reverse the Court of Appeals as to this issue.

Dated this 3rd day of April 1991.

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-5192/5193

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
Cross-Appellant,

v.

JOHN KINGSTON,
Defendant-Appellant,
Cross-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed December 20, 1990

Before: MILBURN, BOGGS, and SUHRHEINRICH, Circuit Judges.

BOGGS, Circuit Judge. John Kingston pled guilty to one count of violating 21 U.S.C. § 841(d), possession of a "listed chemical" with the intent to manufacture and distribute a controlled substance. The United States appeals from the district court's decisions that Kingston was a "minor participant" in the crime within the meaning of the Guidelines, thus giving Kingston a two-level reduction in his offense level, and from the court's exclusion of a conviction for reckless driving from the calculation of Kingston's criminal history category

because it is a "minor traffic infraction." Kingston appeals from the court's determination that he be sentenced according to the amount of the controlled substance that he would have produced had his scheme come to fruition, rather than the amount of the listed chemical he actually possessed. For the reasons that follow, we affirm the district court with respect to Kingston's appeal and reverse the court with respect to the government's appeal. We remand the question of whether Kingston was a "minor participant" to the district court for further proceedings consistent with this opinion.

I

A

Kingston's arrest and conviction arose out of his involvement with two other men in a scheme to manufacture and distribute methamphetamine ("speed"). Kingston's role, which he admitted to at the sentencing hearing, was to finance the purchase of the chemicals needed to make the speed.

The impetus for this scheme came from another participant, David Rogers. Rogers originated the idea and provided a book explaining how to make speed. The role of the third participant, Richard Wright, is unclear, although Wright was part of Rogers's scheme before the two asked Kingston to join them.

Kingston and Wright ordered the "listed chemical" involved in the crime, two kilograms of phenylacetic acid, from a medical supply store. Kingston paid for the acid in advance. Kingston subsequently returned frequently to the supply store to check on the progress of the order. When the order finally arrived, Kingston picked up the acid from the store and delivered it to Rogers's house. Kingston then agreed to finance further purchases of phenylacetic acid. Rogers ordered more acid, again paying in advance with Kingston's cash. Rogers later picked up the new order and delivered it to Wright's

house. The government arrested Kingston, however, before any speed was actually made, and before the scheme had progressed any closer to completion.

B

Kingston pled guilty, and stated in his plea agreement that his case was governed by the Guidelines and that the court could impose any lawful term of imprisonment or fine. The district court found that U.S.S.G. § 2D1.1 applied to violations of § 841(d). Section 2D1.1 establishes a Base Offense Level that varies with the amount of controlled substance involved in the crime. The court, relying on statements in the presentence report (PSR), found that Kingston and his allies would have produced 500 grams of speed had their scheme come to fruition. Kingston does not challenge that finding on appeal.

Because Kingston's crime occurred before November 1, 1989, the court applied the Guidelines in effect at the time of Kingston's crime, rather than the current Guidelines, in determining the applicable Base Offense Level. At that time, the Drug Quantity Table applicable to § 2D1.1 did not list methamphetamine. *See* United States Sentencing Commission, *Guidelines Manual*, App. C (Nov. 1989). The court therefore turned to the Drug Equivalency Tables, U.S.S.G. App. C (Nov. 1989), which state equivalencies between controlled substances not listed in the Drug Quantity Table and substances listed in the Drug Quantity Table. The Drug Equivalency Tables established that one gram of methamphetamine was equivalent to two grams of cocaine for sentencing purposes. Thus, the court used 1,000 grams of cocaine for sentencing, leading to a Base Offense Level of 26 under the old § 2D1.1.

The court then subtracted two levels under U.S.S.G. § 3B1.1 because it found Kingston was a "minor participant" in the scheme. The court also subtracted two additional levels because Kingston accepted responsibility for his crime by pleading guilty. The United States does

not appeal from this latter determination. Thus, the court found that Kingston's final Offense Level was 22.

The court then determined Kingston's criminal history level. The PSR stated that Kingston had two criminal history points: one for a conviction for possession of marijuana and one for a conviction for reckless driving. Two criminal history points place a defendant in criminal history category II. The district court found that reckless driving should be excluded from the calculation of Kingston's criminal history because it is a "minor traffic infraction," and thus excluded under U.S.S.G. § 4A1.2(c). This exclusion reduced his criminal history point total to one, thereby reducing his criminal history category to I.

The sentencing range under the Guidelines for a defendant with an offense level of 22 and a criminal history category of I is 41 to 51 months. The court sentenced Kingston to 41 months of imprisonment. Both parties then appealed.

II

The first, and most intricate, of the appeals before us is Kingston's. Kingston contends that the court should never have examined the Drug Equivalency Tables in determining his Base Offense Level because his violation should be punished according to the amount of the listed chemical he possessed, not the amount of methamphetamine that he could have produced.[1] As we shall see, this argument, although quite interesting, misinterprets U.S.S.G. § 2D1.1.

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[1]Kingston also contends that the district court did not apply § 2D1.1, but rather applied § 2D1.4, the Guideline section applicable to violations of 21 U.S.C. § 846. Section 846 punishes attempts or conspiracies to manufacture a controlled substance. This contention is wholly without merit because the PSR explicitly stated that it was applying § 2D1.1 in its recommendation, and there is no indication that the court was not using the PSR's recommendation.

The crux of the problem is this: violators of § 841(d) have not sold or made any controlled substances, but § 2D1.1, which the Guidelines dictate be followed in sentencing violators of § 841(d), United States Sentencing Commission, *Guidelines Manual*, App. A (Nov. 1989), fixes sentences based solely by the amount of controlled substance involved in the offense. As Congress intended to punish severely the possession of listed chemicals with the intent to manufacture controlled substances, having provided a maximum of ten years' imprisonment for violators, courts should interpret these provisions to arrive at a fair method of assessing meaningful punishment.

Kingston contends that a fair method would necessarily look to the amount of the listed chemical involved in the offense because he was convicted for possession of a listed chemical. Kingston notes that § 2D1.1 establishes Base Offense Levels for both named and unnamed controlled substances. Kingston then notes the statutory definition of "controlled substances": "[A] drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802 (6). Although phenylacetic acid is not listed in any of the schedules, Kingston surmises that phenylacetic acid must be punishable as an "other Schedule I or II controlled substance[]," U.S.S.G. App. C (Nov. 1989), because phenylacetic acid is a precursor chemical for methamphetamine and "immediate precursors" are part of the definition of "controlled substance." He argues that "precursor chemical" must be included in the phrase "immediate precursor" used in the § 802 (6) definition of "controlled substance," because otherwise Congress would have created a crime for which the Guidelines provide no punishment. Thus, violations of § 841(d) must be punished according to the Base Offense Level used for controlled substances not specifically listed in the Drug Quantity Table. In Kingston's case, two kilos of phenylacetic acid were involved, translating in his theory of punishment into a Base Offense Level of 12.

This theory is attractive, because it solves a rather glaring problem in the promulgation of the Guidelines. We nevertheless reject Kingston's theory because we believe that it is contrary to the statutes involved, and because we believe that punishing violations of § 841(d) according to the amount of controlled substances that would have been involved had the plan progressed is more in line with the spirit of the laws.

The first reason Kingston's argument fails is that "immediate precursor" is a defined term that does not include every chemical precursor. "Immediate precursor" is defined in 21 U.S.C. § 802 (23) as a substance:

> (A) which the Attorney General has found to be and by regulation designated as being the principle compound used, or produced primarily for use, in the manufacture of a controlled substance; (B) which is an immediate chemical intermediary used or likely to be used in the manufacture of such controlled substance; *and* (C) the control of which is necessary to prevent, curtail, or limit the manufacture of such controlled substance.

The referenced regulations appear at 21 C.F.R. § 1308.12(g), and the Attorney General has not listed phenylacetic acid in them. Thus, phenylacetic acid cannot be an "immediate precursor" to methamphetamine.

Kingston could easily have been confused by the similarity between "precursor chemicals" and "immediate precursors." An "immediate precursor" is the chemical that can be directly transformed into the controlled substance. Methamphetamine's "immediate precursor" is P2P (Phenyl-2-propanone). A "precursor chemical" is any chemical involved at any stage in the production of a controlled substance. In this case, phenylacetic acid is used to make P2P. Thus, despite the confusion, the two terms are easily distinguishable.

Kingston's argument is also belied by the Drug Quantity Table. All of the drugs listed in the Table are controlled substances. None of the "listed chemicals" from 21 U.S.C. § 802 (34) is included in the Table. If the Commission had actually intended to punish less severely convictions under § 841(d) where no controlled substance was directly involved in the offense, it could easily have added to the Table specified amounts of "any listed chemical." That it did not do so suggests that Kingston's theory was not adopted, explicitly or implicitly, by the Commission.

This discovery, however, does not solve our problem. We still must ascertain a method whereby violations of § 841(d) can be punished under U.S.S.G. § 2D1.1. We believe that the method advanced by the Government, basing the sentence on the amount of the controlled substance that would have been involved in the crime had the scheme advanced, is the fairest way to reconcile § 841(d) and U.S.S.G. § 2D1.1.

We begin by noting that § 841(d) criminalizes possession of a listed chemical *only* if there is an intent to use that chemical to manufacture a controlled substance. Mere possession of phenylacetic acid alone is not illegal. Congress underscored this focus on the controlled substance by placing this law in § 841. Section 841 is the most important section limiting the use of controlled substances. It criminalizes the manufacture, distribution, dispensation, or the possession with the intent to do any of the above acts, of any controlled substance. 21 U.S.C. § 841(a). The inclusion of language criminalizing possession of a listed chemical with the intent to manufacture a controlled substance in § 841 suggests that this prohibition is also intended to be a central part of Congress's scheme to limit controlled substances. Thus, it is fair that violations of § 841(d) be punished with respect to the amount of the controlled substance that the government is seeking to limit.

This approach is confirmed when we compare the purpose and method of punishment of § 841 to that of § 846, the attempt and conspiracy provision of the Federal controlled substances limitation effort. The purpose of the Federal effort is to control the distribution, and thus indirectly the use, of certain chemical substances. Thus, § 841(a) makes distribution and sale illegal, and § 846 tries to prevent the substances from ever being created by making the attempt to create them illegal. Section 841(d) moves this system of control even further back in time by preventing persons from even getting close to creating the substances. Section 841(d) is thus effectively an attempt statute that penalizes acts earlier in the process of manufacturing controlled substances.

Violations of § 846 are punished with reference to the amount of controlled substance that would have been involved had the attempt been successful. U.S.S.G. § 2D1.4. In fact, the same Drug Quantity and Equivalency Tables used in § 2D1.1 are also used in § 2D1.4. As both § 841(d) and § 846 have the same object, limiting access to controlled substances by criminalizing attempts to create them, it is sensible that they both be punished according to the same principles.

We are aware that no other circuit has previously considered the application of § 2D1.1 to violations of § 841(d). We note, however, the consistent application of our theory of punishment to cases involving § 846. The Tenth Circuit in *United States v. Havens*, 910 F. 2d 703, 705-06 (10th Cir. 1990), recently found that this method of estimating the amount of controlled substance involved in an offense was proper under § 846. The court noted that the defendant pled guilty to attempted manufacture of methamphetamine, but wanted to be sentenced "for only the trace amounts of finished drugs found with the precursor chemicals. . . . [This] is inconsistent with his guilty plea to *attempt* to manufacture. Defendant had not "attempted" to produce the completed drugs actually found." *Id.* at 705. This reasoning is directly applicable to Kingston's guilty plea here. Kingston pled guilty to

possession *with intent to manufacture* a controlled substance. He did not intend to manufacture the two kilos of phenylacetic acid. He intended to use the acid to manufacture a certain amount of speed. Just as Havens was sentenced based on the estimated quantity of methamphetamine he intended to produce, so too should Kingston be sentenced according to his intent.

Other circuits in § 846 cases have estimated the amount of methamphetamine which could have been produced based on the amount of precursor chemicals discovered at the laboratory site. *See United States v. Manthei*, 913 F. 2d 1130, 1133, 1137-38 (5th Cir. 1990); *United States v. Touby*, 909 F. 2d 759, 773 (3d Cir. 1990); *United States v. Wagner*, 884 F. 2d 1090, 1097-98 (8th Cir. 1989).

One question still remains at this point in the analysis. Kingston could still argue that a lower Base Offense Level is appropriate for his crime even under our theory of punishing violators of § 841(d). He could argue that since methamphetamine is a Schedule II substance, *see United States v. Schrock*, 855 F. 2d 327, 331-32 (6th Cir. 1988), and was not listed in the Drug Quantity Table at the time he committed his crime, offenses involving methamphetamine should be penalized based on the offense levels for "other Schedule II substances."

This argument should also fail because of the existence of the Drug Equivalency Tables. The Tables come into use only when a controlled substance is not listed in the Drug Quantity Table. Methamphetamine is listed in the Drug Equivalency Tables as being equivalent to cocaine. The "other" Schedule II substances referred to in the Drug Quantity Table must therefore be those Schedule II substances listed in neither the Drug Quantity nor the Drug Equivalency Tables.

This line of analysis is further bolstered by the recent amendments to the Sentencing Guidelines. Methamphetamine is now listed in the Drug Quantity Table. Had Kingston committed his offense after the

amendments had been adopted, his Base Offense Level would be 28. Our theory of interpreting § 2D1.1 gives Kingston a Base Offense Level of 26, while Kingston's theory would give him a Base Offense Level of 12. The small difference between 28 and 26 suggests that methamphetamine was never intended to be punished under the offense levels attached to "other" Schedule II substances.

Accordingly, the district court's determination that Kingston's Base Offense Level should be 26 is affirmed.

III

We now address the first of the government's contentions. U.S.S.G. § 4A1.2(c)(2) permits the exclusion of certain criminal convictions from the calculation of a defendant's criminal history provided they are, or are similar to, certain listed offenses. Those offenses are hitchhiking, juvenile status offenses and truancy, loitering, vagrancy, public intoxication, and "minor traffic infractions." U.S.S.G. § 4A1.2(c)(2). The district court excluded Kingston's Tennessee conviction for reckless driving "because the guidelines aren't too clear on this, and because of the flexibility in the term 'minor traffic *offense*' . . . I think it's appropriate here to give the Defendant the benefit of the doubt." (emphasis supplied). The government contends on appeal that this finding is incorrect because "infraction" is a defined term that cannot include Kingston's reckless driving conviction.

The government argues that the statutory definition of "infraction" is an offense punishable by a maximum of "[f]ive days or less, or . . . no imprisonment." 18 U.S.C. § 3559. Reckless driving is punishable in Tennessee by a maximum jail term of 90 days. Tenn. Code Ann. § 55-10-205. Kingston's counsel also conceded this at oral argument.

We agree with the Ninth Circuit's determination in *United States v. Aichele*, 912 F. 2d 1170 (9th Cir. 1990), that as a matter of law reckless driving is not a "minor traffic infraction" under the Guidelines. The *Aichele* court noted that U.S.S.G. § 1B1.9 also defines "infraction" as an offense with a maximum term of imprisonment of five days or less. Kingston has offered no alternative interpretation of the word "infraction," relying instead on his actual penalty -- a $50 fine -- and observations that other traffic infractions have greater punishments than does reckless driving to support its exclusion. We are persuaded that the Guidelines use "infraction" as a term of art, and do not intend courts to weigh the relative seriousness of traffic offenses when deciding which convictions to exclude from criminal history calculations. We therefore reverse the district court's exclusion of Kingston's reckless driving conviction. This will result in Kingston having a criminal history score of two, and thus a criminal history category of II.

IV

U.S.S.G. § 3B1.2(b) authorizes a district court to reduce the defendant's final offense level by two if the defendant was a "minor participant" in the offense leading to conviction. The district court found that Kingston was a "minor participant" without hearing any proof from either party in support of that contention, relying solely on the PSR's determination that Kingston was "entitled" to "minor participant" status. We agree with the government's contention that our intervening decision in *United States v. Rodriguez*, 896 F. 2d 1031 (6th Cir. 1990), requires reversing this decision.

We held in *Rodriguez* that a defendant must prove by a preponderance of evidence entitlement to a downward revision of the appropriate offense level. *Rodriguez*, 896 F. 2d at 1032-33. We reached this conclusion, in accord with the Fourth Circuit in *United States v. Urrego-Linares*, 879 F. 2d 1234 (4th Cir. 1989), because "the

burden of proof is ordinarily placed upon the party who benefits from the establishment of a fact." *Rodriguez*, 879 F. 2d at 1033. In so holding, we expressly overruled the holding in *United States v. Dolan*, 701 F. Supp. 138 (E.D. Tenn. 1988), to the contrary.

Kingston raises two procedural arguments that purportedly prevent the government from making this argument. Kingston first alleges that the government did not comply with Local Rule of Practice 27.3, which requires any objection to a probation officer's report to be supported by affidavits. Also, Kingston contends that the government did not object to the PSR prior to the sentencing hearing, as it presumably was required to do.

We reject both of these arguments. We do not ordinarily enforce local rules of practice when the district court, as here, does not enforce them. We decline to alter our practice now.

We also will not resolve a dispute between the parties regarding whether the government did object to the PSR before the sentencing hearings. The government says that it did file the objection, while Kingston says it did not. Kingston provides no proof in support of his contention, but the district court was surprised that the government had an objection because the PSR stated that the government had no objections. The government contends that the PSR statement was a mistake: since the government rarely objects to PSRs, the probation officer assumed it was not objecting to this PSR. In response to the court's surprise, the government read at the sentencing hearing from what it said was a letter dated November 3, 1989, objecting to the classification of Kingston as a "minor participant." Since this issue was not raised by Kingston at the sentencing hearing, we decline to resolve this essentially factual dispute at this time. Kingston is free to raise his contention before the district court upon remand.

V

We therefore AFFIRM the district court with respect to its determination of Kingston's Base Offense Level. We REVERSE the district court's decisions concerning the exclusion of Kingston's reckless driving conviction and the determination that Kingston was a "minor participant" in the scheme. We REMAND to the district court for further proceedings consistent with *Rodriguez* in order to provide Kingston with the opportunity to prove that he is entitled to "minor participant" status.